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No. 331

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

UNITED STATES OF AMERICA,
Petitioner,

vs.

A. B. LEACH & CO., INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

GEORGE K. BOWDEN,
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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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BRIEF FOR THE RESPONDENT.

Opinions Below.

This cause originated in a judgment for the Respondent, Plaintiff below, entered in the District Court for the Northern District of Illinois, Eastern Division, on November 22, 1935. The opinion of the District Court, not appearing in the Federal Reporter, is set out in the record, (R. 5).

The judgment of the District Court was affirmed by the Circuit Court of Appeals for the Seventh Circuit, 84 F. (2d) 908 (R. 15-17).

Jurisdiction.

Pursuant to Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, this court granted its writ of certiorari.

The Issue Presented.

Where an investment banker purchases shares of stock and causes certificates to be issued to it in the name of an employee, does the mere nomination of such employee as its dummy in the transaction subject the banker to a stock transfer tax under Schedule A (3) of Section 800 of the Revenue Act of 1926?

Statutes Involved.

Revenue Act of 1926, c. 27, 44 Stat. 9:

TITLE VIII—STAMP TAXES.

SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid for and in respect of the several bonds, debentures, or *certificates of stock* and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title * * * by any person who makes, signs, issues, sells, removes, consigns, or ships the same * * * the several taxes specified in such schedule. * * *

SCHEDULE A—STAMP TAXES.

2. Capital stock, issue: On each original issue, whether on organization or reorganization, of certificates of stock, * * * by any corporation, on each $100 of the face value or fraction thereof, 5 cents: * * *

3. Capital stock, *sales and transfers*: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers *of legal title to shares or certificates of stock* or of profits or of interest in property or accumulations of any corporation, *or to rights to subscribe for or to receive such shares or certificates*, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share: * * * (Italics supplied.)

Statement.

During the years immediately prior to 1931, Respondent was an incorporated investment banker engaged in buying new issues of stock from issuing corporations and selling such stock to the public, (R. 1). For its convenience in marketing the stock so purchased it took delivery of the certificates evidencing the shares in the name of a dummy, George I. Vercouter, an employee, (R. 4).

During the years in question Respondent purchased 826,320 shares of original stock from various corporations. The issuance tax imposed by Paragraph 2 of Schedule A of Section 800 of the Revenue Act of 1926 was duly paid upon the issuance of these shares of stock, (R. 3).

In August and September of 1931 the Commissioner of Internal Revenue assessed against the Respondent $16,526.40 under the provisions of Schedule A (3) of Section 800 of the Revenue Act of 1926. This tax was assessed on the theory that the Respondent had transferred to George I. Vercouter, its dummy, the right to receive the shares of stock issued in his name, (R. 1-3).

Suit was instituted for a refund, resulting in a judgment for the Plaintiff which was affirmed upon appeal. This proceeding followed.

SUMMARY OF ARGUMENT.

I.

Acceptance by a Subscriber of Certificates of Stock Issued in the Name of a Dummy Does Not Involve a Transfer by the Subscriber to the Dummy of the Right to Receive the Shares of Stock.

II.

The Judicial Decisions Have Held with Peculiar Uniformity That the Issuance of Stock to a Subscriber in the Name of Its Nominee Does Not Involve a Transfer from the Subscriber to the Nominee of the Right to Receive the Stock.

III.

Amendments to Section 800 of the Revenue Act of 1926 Do Not Lend Support to the Contention That Congress Intended to Include in the Statute as a Taxable Transfer the Issuance of Original Stock in the Name of a Nominee of the Subscriber.

ARGUMENT.

I.

Acceptance by a Subscriber of Certificates of Stock Issued in the Name of a Dummy Does Not Involve a Transfer by the Subscriber to the Dummy of the Right to Receive the Shares of Stock.

In years immediately prior to 1931 there were delivered to the Respondent, as a subscriber for stock, certificates of original shares of corporate stock issued in the name of George I. Vercouter, the nominee or dummy of the Respondent. Subdivision (2) of Schedule A, Title VIII, of the Revenue Act of 1926 imposes a tax upon the issuance of original stock. Respondent has paid this issuance tax. Its liability for this tax is not here in dispute.

In addition to the *issuance* tax on the transaction Respondent has been subjected to a *transfer* tax imposed under the provisions of Subdivision (3) Schedule A, Title VIII of the Revenue Act of 1926. This subdivision imposes an excise

> "On all sales, * * * or deliveries of, or transfers of legal title to shares or certificates of stock * * *, or to rights to subscribe for or to receive such shares or certificates, * * * whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not * * *."

The original issuance of the stock was in the name of Vercouter, Respondent's nominee. There is not, then, involved here the question of whether there was a transfer to Vercouter of *legal title* to shares of stock. The only question presented here is, was there *transferred* to Vercouter by Respondent the right to receive the stock? Petitioner

contents that Respondent transferred this right to its nominee. This contention Respondent protests.

Respondent contends that its nominee, Vercouter, had no *rights* to receive the stock. At no time prior to the issuance of the stock in his name could Vercouter by any action at law or in equity compel the issuance of the stock to him. At any time prior to the issuance of the stock in the name of Vercouter, Respondent could by appropriate action enforce its rights to have the stock issued in its own name. Upon the issuance of the stock the right to receive it ended.

If Respondent's nominee could not enforce by appropriate legal action the issuance of the stock to himself he was not the transferee of rights to receive the stock. Hohfeld in *Fundamental Legal Conceptions,* pages 36-38, discusses at length the meaning of the term "rights". He quotes with approval the definition of "right" by Justice Stayton in *Mellinger* v. *City of Houston* (1887), 68 Tex. 45, 3 S. W. 249, 253:

> "A right has been well defined to be a well-founded claim, and a well-founded claim means nothing more or less than a claim recognized or secured by law. * * * it must necessarily be held that a right in a legal sense exists when in consequence of the existence of given facts, the law declares that one person is entitled to enforce against another, a given claim, or to resist the enforcement of a claim urged by another."

Unless Respondent's nominee had a legally enforcible claim to receive the stock he did not have "rights". Clearly, Vercouter, did not possess "rights" to receive the stock.

To give "right" a definite and appropriate meaning it is of benefit to determine the correlative of right, that is, duty. In *Lake Shore & M. S. R. Co.* v. *Kurtz,* 10 Ind. App. 60, 37 N. E. 303, 304, it is stated:

> "A duty or a legal obligation is that which one

> ought or ought not to do. 'Duty' and 'right' are correlative terms. When a right is invaded, a duty is violated."

If Respondent's nominee had a "right" to receive the stock, there existed as a correlative in the Respondent a duty owed Vercouter, to permit him to receive the stock. Clearly Respondent owed no such duty to its nominee in respect of the receipt of the stock.

The transaction under discussion is taxable under Subdivision (3) only if Respondent *transferred* to its nominee the right to receive the stock. Was there such a transfer? Any right that existed in respect of the stock was a contractual right arising out of the subscription contract entered into by Respondent. The transfer of such a right would be the transfer of a chose in action. Beale in *A Treatise on the Conflicts of Laws,* Volume I, page 79, states:

> "Choses in action, including contract rights and debts, are by their very nature incapable of transfer; for they are two party relations, and the personalities of the parties are fundamental qualities of the relation. A new party could be inserted only by such a complete change in the nature of the obligation as would be a destruction of it and the creation of a new one; and this can be done only by mutual consent of both parties. Such a right then is incapable of transfer; it can only be assigned. An assignment is merely a contract that the assignee enjoy all the benefits of it, including that of suing. It does not put the assignee into the position of the assignor, or affect his rights except collaterally."

Probably the Respondent could not have transferred to anyone its rights under the subscription contract. It could have assigned its rights. For purposes of this argument, the word "transfer" as used in the statute shall be treated as synonymous with the word "assignment". Respondent's nominee, Vercouter, was not the transferee or the

assignee of the subscription rights belonging to the Respondent. Such rights could have been assigned to Vercouter only by contract. In a contract there must be two parties. Vercouter, as the nominee of the Respondent, could not have been the second party to the contract. He was the mere nominee of the Respondent. The action, not the "transaction", of Respondent in appointing its employee a nominee or agent was not the assigning to a second party to a contract of subscription rights held by Respondent. When a principal acts through an agent, he does not transfer or assign to the agent property or rights to property or choses in action.

Whatever rights to receive the stock subscribed for by the Respondent, remained the rights of the Respondent. They did not become the rights of its nominee. No act of the Respondent in the transaction *transferred* any rights to receive the stock to its nominee. The Circuit Court of Appeals for the Seventh Circuit stated the same conclusion as follows (R. 17):

> "We see no material distinction between the situation where a taxpayer takes title to stock in its own name and where it uses the name of an agent. * * * We do not consider that the transaction whereby a principal uses the name of an agent in acquiring property which it was entitled to acquire in its own name results in a transfer of the title to that property to that agent. By such a transaction the taxpayer relinquishes nothing. The only transfer which has taken place here is from the newly organized corporation to the taxpayer in the name of the agent or nominee of the latter."

Respondent was a corporation. It was an incorporated banker. It subscribed for stock to be sold by it to the public. Its business necessitated that the stock issued to it be transferable with the same facility that stock issued in the name of an individual could be transferred. Accordingly, the issuance of the certificate in the name of a

nominee, an individual, was employed. If Petitioner's contention in this case is adopted, an undue hardship is imposed upon an incorporated banker. It is subjected to both an issuance and a transfer tax on a transaction which results in only an issuance tax when entered into by an individual. This hardship does not end with the issuance of the stock, however. Pursuant to Petitioner's contention, when the incorporated banker sells the stock it becomes liable for two more transfer taxes: (1) a tax on the transfer from the nominee back to the banker, and (2) a tax on the transfer from the banker to its purchaser. Thus, four taxes would be collectible on one purchase and one resale. A construction of the taxing statute resulting in such an accumulation of taxes should not be adopted unless the provisions thereof lend themselves to no other interpretation.

The issuance of certificates of corporate stock in the name of a nominee is a common commercial practice. The Regulations promulgated under the provisions of the Revenue Act of 1926 do not provide that this type of transaction is subject to a stock transfer tax. Had Congress intended to tax this transaction as a transfer of the right to receive stock from the subscriber to the nominee, it could have done so simply and clearly.

II.

The Judicial Decisions Have Held with Peculiar Uniformity That the Issuance of Stock to a Subscriber in the Name of Its Nominee Does Not Involve a Transfer from the Subscriber to the Nominee of the Right to Receive the Stock.

The contention advanced by the Government in this proceeding is not new. It has been alternately suggested and abandoned by Bureau officials throughout the past thirty-

five years. With singular uniformity it had been rejected by the courts until the decision in *Founders General Corporation* v. *Hoey,* 12 F. Supp. 290, decided September 10, 1935.

The first recorded decision is *United States* v. *Clawson, et al.* (D. C., E. D. Mo.), 119 F. 994, a case arising under the stamp tax provisions of the Act of March 2, 1901, which imposed a transfer tax with respect to "bucket shop" transactions. One Swartz, *operating in his own name,* acted as the undisclosed agent of the Boyd Commission Company. He sold 25 shares of stock to Loomis, after having procured the approval of the commission company, which would furnish the shares in the event of a call for delivery. He executed a memorandum of sale *in his own name,* affixed the required two cent stamps, delivered the memorandum to Loomis, received the required margin, and accounted in due course to the commission company. The commission company and Clawson, its manager, were indicted for having engaged in a transaction with Swartz for the sale of 25 shares of stock without affixing the required revenue stamps upon a memorandum of sale. The court directed a verdict of not guilty, stating in the course of its opinion:

> "But it is contended that, even if Swartz acted as agent for the commission company in the transaction, he, theoretically, at least, purchased the stock which he was to deliver to Loomis from the commission company, and therefore that the latter company was required by the provisions of the act of Congress in question to make and stamp a memorandum of sale thereof to Swartz. To this contention I cannot give assent. If Swartz was agent of the commission company in the transaction, his act was the act of that company, and not his own. The transaction was the transaction of that company, and not the transaction of Swartz.
>
> * * * * * *
>
> Being perfectly clear in my own mind that *the transaction disclosed by the evidence in this case is a single*

> *transaction, I cannot treat it as involving two,* and as requiring the payment of a tax by the principal, when the agent has already paid all the tax to which the single transaction is subject." (Italics supplied.)

The issue does not appear to have been asserted again for several years. It next arose, however, in *Union Trust Co.* v. *Heiner,* (D. C., W. D. of Pa.) 26 F. (2d) 391, decided February 8, 1928. This case involved the stamp tax provisions of the Revenue Act of 1921, identical in their terms with those of the Revenue Act of 1926. The plaintiff had purchased stock to be delivered to it or its nominee. At its request the certificate was issued in the name of James M. Kommer, an employee of the plaintiff. Kommer had no interest in the stock and merely took title thereto for the convenience of the plaintiff in connection with future sales and transfers of the stock to the public. The stamp tax with respect to the original issue of the stock was paid. The Government exacted a further tax with respect to the instrument nominating Kommer to receive the certificate. Suit was instituted for the refund of this tax. The court stated, page 391:

> "In our opinion, there was but one transaction involved in this issue of stock. There was no transfer of any rights in the stock to Kommer. He was the mere employee and agent of the plaintiff, appointed to receive and hold this capital stock for the sole and exclusive benefit of the plaintiff."

No appeal was taken by the Government in the Heiner case.

Six years later, the same contention was again asserted in *Dean* v. *Caldwell & Co.* (D. C., M. D. Tenn.), 9 F. Supp. 177. There, Caldwell & Co., a large investment house, had purchased certain securities, and, solely for its convenience, had caused them to be taken in the name of E. A. Goodloe, its nominee. Goodloe was an employee.

In rejecting the Government's contention that a tax was due because of an alleged transfer from Caldwell & Co. to Goodloe, the District Court said, page 179:

> "It is conclusively shown that the nominee had no interest in the stock * * * and merely took title to the same for the convenience of his employer, the defendant, in connection with future sales and transfers of stock to the public. * * *"

The Government again abandoned its contention. It took no appeal.

In *Consolidated Equities, Inc.* v. *White,* (D. C., Mass.) 7 F. Supp. 851, affirmed (C. C. A. 1) 78 F. (2d) 435, Plaintiff ordered its broker to purchase voting trust certificates. The broker paid the purchase money to the issuing corporation which caused certificates of stock to be issued to voting trustees, who in turn issued certificates for said stock to the Plaintiff. The Government contended that a transfer tax was due on the transfer of the right to receive legal title to the certificates from Plaintiff to the voting trustees. The court below rejected the Government's contention and was affirmed by the Appellate Court. That court stated, page 436:

> "It is true, as the collector contends, that in matters of this sort, the statute requires that substance rather than form shall be considered, and that 'all transfers of legal title to shares or certificates whether technical sales or not' are taxable. (*Provost* v. *U. S.* 296 U. S. 443, 458, 46 S. Ct. 152, 155, 70 L. Ed. 352; *Goodyear Co.* v. *U. S.* 273 U. S. 100, 47 S. Ct. 263, 71 L. Ed. 558); but *this does not warrant imputing to transactions a character substantially different from what they in fact were in order to make them taxable.*" (Italics supplied.)

In *Field, Glore & Co.* v. *United States,* (D. C., N. D. of Ill.), decided April 8, 1935, (1935 C. C. H. 9290), the plaintiff purchased large blocks of stock. The plaintiff caused the stock certificates to be issued in the names of certain

of its employees, as dummies. Consistent with the view enunciated in an unbroken line of authorities in the district courts, the court again rejected the contention of the Government and held that no transfer tax was due because of an alleged transfer of the right to receive the stock. No appeal was taken by the Government from this decision.

A similar conclusion was reached by the Court of Claims in *Automatic Washer Co.* v. *United States,* 15 F. Supp. 70, a case now before this court on certiorari, Docket No. 330.

In conflict with the judicial decisions cited herein is *Founders General Corporation* v. *Hoey,* 84 F. (2d) 976 (C. C. A. 2), affirming the decision rendered below in favor of the Government, 12 F. Supp. 290.[1] In this case an incorporated investment banker subscribed for stocks and directed that the certificates be issued in the name of Benton & Co. The certificates were issued in the name of Benton & Co. and delivered to the investment banker. Benton & Co. was a partnership employed under contract to act as nominee for the banker. In respect of this contract the court observed:

> "It was so provided that Benton & Co. should have no 'beneficial interest' in securities so held, that it waived all right, title, and interest in any securities held or received by it."

The court observed that the question in issue was "whether the mere nomination of Benton & Co. as dummy in whose name the stock was registered, subjected the Plaintiff to a stock transfer tax under Title VIII, Section 800, of the Revenue Act of 1926."

In reaching its conclusion that there was a taxable transfer, the court stated, page 979:

> "There was a transfer to Benton & Co. of the right to receive the stock."

1. The Court rendered its decision in September, 1935. Some seven months later a different judge in the same court rendered a conflicting opinion, *National Bond & Share Corporation* v. *Hoey,* 14 F. Supp. 787.

Where the court finds that the nominee had no rights to the stock it is difficult to appreciate why the court should hold that there was a transfer to the nominee of the right to receive the stock.

Mr. Justice Hand in his opinion in the Founders General case cites with approval two decisions interpreting Section 270 of the Tax Law of the State of New York, as amended by Laws 1911, c. 352. This section provided for a stock transfer tax. One of the cases, *Bonbright & Co.* v. *New York*, 165 Appellate Division 640, 151 N. Y. Supp. 35, involved the following: In 1912 a partnership caused its assets to be transferred to a corporation in exchange for 100,000 shares of stock issued to the partnership in one certificate. The partnership sold rights to trustee certificates for 28,000 shares. Subsequently it entered into a trust agreement with the Bankers Trust Company, as trustee, and transferred to the Bankers Trust Company the 100,000 shares. Under protest a transfer tax was paid on the full number of shares. Suit was brought to recover the transfer tax paid on the 72,000 shares on the ground that there had been no transfer of the beneficial interest in these shares to the trust company. The court held that there had been a transfer of legal title and that was sufficient for the imposition of the tax.

The other case cited was *Travis* v. *Ann Arbor Co.*, 180 App. Division 799, 168 N. Y. Supp. 53, affirmed 227 N. Y. 640, 126 N. E. 923. Defendant purchased shares of stock and had the certificate issued in the name of a nominee. The nominee left the employ of the defendant and the title to the certificate was transferred from the nominee to a second nominee. The second nominee endorsed the certificate and left it in the custody of the defendant. Two transfer taxes were exacted; one on the transfer from the first nominee to the second nominee and the other on the en-

dorsement in blank of the certificate of stock by the second nominee and its delivery to the defendant. The court affirmed both taxes. This case involved the transfer of record title to issued stock and not the question of the transfer of rights to receive original stock when issued. Neither of the cases involved the question presented in this proceeding.

Petitioner contends in its brief that the decision of the court below is in conflict with the decision in *Raybestos-Manhattan, Inc.* v. *United States,* 296 U. S. 60, 56 S. Ct. 63, 80 L. Ed. 42. That decision is devoted to the disposition of a conflict which had arisen in cases involving a controversy quite distinct, the reorganization cases in which the assets of corporation A are transferred to corporation B in exchange for the capital stock of B issued directly to the stockholders of A. The court held that this issuance by B of its shares of stock directly to the stockholders of A gave rise, under the provisions of Section 800, Title VIII, of the Revenue Act of 1926, to liability for not only an issuance tax, but a transfer tax, based upon the transfer from corporation A to its shareholders of the right to receive the stock issued by corporation B.

The Raybestos-Manhattan decision gave finality to a principle previously asserted and repeatedly reasserted in the lower courts. *Marconi Wireless Telegraph Co.* v. *Duffy* (D. C., N. J.), 273 F. 197; *Consolidated Equities, Inc.* v. *White,* (D. C., Mass.), 9 F. Supp. 145; *United States* v. *Brown Fence & Wire Co.* (D. C., N. D. of Ohio), 9 F. Supp. 1008; *Raybestos-Manhattan, Inc.* v. *United States* (Ct. Cl.), 10 F. Supp. 130; *George A. Hormel & Co.* v. *United States* (D. C., Minn.), 10 F. Supp. 623. It resolved an apparent conflict with the decision of the Third Circuit in *MacLaughlin* v. *Westmoreland Coal Co.* 73 F. (2d) 1004, affirming 8 F. Supp. 963 and certain other reorganization cases. But

it had nothing whatever to do with the principle now so well established in the nominee cases.

The reorganization cases hold that the transfer tax "is laid upon *the substance of the transaction* rather than the form," *Raybestos-Manhattan* v. *United States*, 10 F. Supp. 130. Petitioner would abandon that proposition in its nominee cases. It would reconstruct the form of the transaction, and then levy a tax by reference to the reconstructed form, wholly in disregard of the substance.

In the reorganization case the transferor corporation had a right to receive the shares of stock in the transferee corporation. It could part with that right only with the assent of its stockholders. That assent it procured in exchange for the transfer of that right to the stockholders. After that transfer the stockholders could enforce the right to receive the stock involved. In the reorganization case, in contrast to the nominee case, there was a relinquishment of the right to receive the shares or certificates and the acquisition of that right by another. There was a transfer. Mr. Justice Stone in his opinion states:

> "It is the relinquishment of the ownership for the benefit of another, and the resultant acquisition of it by him which calls the statute into operation."

In the reorganization case, by agreement, the transferor corporation transferred or assigned its rights to the stock to its stockholders, a party to the contract. In the nominee case the subscriber makes no assignment to the nominee. The nominee is not a party to any contract. Neither is he a grantee by any conveyance. He is only the subscriber's *alter ego*.

III.

Amendments to Section 800 of the Revenue Act of 1926 Do Not Lend Support to the Contention That Congress Intended to Include in the Statute as a Taxable Transfer the Issuance of Original Stock in the Name of a Nominee of the Subscriber.

Petitioner in its brief, pages 10-13, suggests that amendments to Section 800, Title VIII of the Revenue Act of 1926, support its contention that the issuance of stock to a subscriber in the name of its nominee is a transfer by the subscriber to the nominee of the right to receive the stock. There have been two such amendments. In 1932 Congress expressly exempted from the application of the Act, transfers of legal title to shares or certificates of stock from a fiduciary to his nominee or from such nominee to another, see Section 723 of the Revenue Act of 1932. In 1936 Congress expressly exempted from the application of the Act transfers of stock to a nominee of a broker, Act of June 29, 1936, c. 865, 49 Stats. 2029.

Both of these amendments pertain to transfers of issued stock to certain nominees. They do not pertain to the issuance of original stock in the name of a nominee of a subscriber. They limit the provisions of the statute pertaining to the transfer of legal title to stock already issued. They do not pertain to the provisions of Section 800 of the Revenue Act of 1926, taxing the transfer of "rights to subscribe for or to receive" stock. There would be no inconsistency in the courts holding that under Subdivision (3) of Schedule A, Section 800, of the Revenue Act of 1926, before amendment, that the transfer of recorded title of issued stock from a holder to a nominee would be a taxable transfer of legal title of shares or certificates of stock, and in holding that the issuance of original stock to the nominee

of a subscriber would not involve a taxable transfer to the nominee of right to receive the stock. The amendments pertain to a different taxing provision than the one involved in this appeal.

The amendments made to the Revenue Act of 1926 above referred to do indicate that where the attention of Congress has been called to the likelihood of the Bureau's taxing as a transfer, a transaction which is in form a transfer, but in substance is not, the Congress will amend the stock transfer provisions to expressly exclude from their application such transaction. That Congress has not by amendment expressly exempted the application of the stock transfer tax provisions to exclude the issuance of original stock to the nominee of a subscriber suggests that Congress did not intend to include such a transaction in the original act.

In 1928 *Union Trust Company* v. *Heiner, supra,* was promulgated. From that decision the Commissioner did not take an appeal. From 1928 to 1935 that decision, holding that the issuance to a subscriber of stock in the name of its nominee did not constitute a taxable transfer under the stock transfer tax was taken as law. During that period Congress would have had no occasion to amend the law unless it did not approve the decision rendered in the Heiner case.

In 1929 the Bureau of Internal Revenue published a ruling that transfers of stock to the nominee of a broker were not taxable under the stock transfer tax provisions of the Revenue Act of 1926. On March 9, 1936, the Bureau of Internal Revenue published another decision reversing its former position. When this action was brought to the attention of the Congress it adopted the amendment above referred to, expressly exempting transfers of stock to a nominee of a broker. See Report of Ways and Means Committee, House Report No. 3023, 74th Congress, 2d Session, page 2.

The two amendments made to the Revenue Act of 1926 exempting certain transfers of the legal title to stock pertain to transactions admittedly involving transfers of title. *The question involved in this appeal is not whether a transfer is taxable, but whether the transaction is a transfer.*

Conclusion.

Respondent contends that for the reasons stated the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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